

2008

David Anderson and Kristine Anderson v. Matthew Kriser : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DAVID ANDERSON and KRISTINE
ANDERSON,

Plaintiffs and Appellants,

vs.

MATTHEW KRISER,

Defendant and Appellee,

Court of Appeals No. 20080989 CA

BRIEF OF APPELLEE

**Appeal from Decision of the Fourth Judicial District Court, Utah County
The Honorable Samuel D. McVey**

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STATUTES

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Anderson built the home, David and Kristine noted cracks in the foundation caused by settling in the soil. The Anderson's thereafter brought suit against Matthew Kriser personally, alleging fraudulent nondisclosure of collapsible soils. The Andersons did not bring suit against Country Living Development, LLC, nor against Norman Anderson.

At the time of the transaction that forms the basis of this action, Defendant and Appellee Matthew Kriser was an employee and shareholder of Country Living Development, LLC. (See Affidavit of Matthew Kriser attached as Addendum 1; Record p. 139-40). Country Living Development was engaged in developing real estate in the Aspen Cove real estate development in Pleasant Grove, Utah. (Record p. 108). As an employee of Country Living Development, Matthew Kriser's responsibilities were to oversee the sales and marketing of land held by Country Living Development. (See Portions of Deposition of Matthew Kriser attached as Addendum 2; Addendum 1; Record p. 108, 139-40). Drew Kriser was also an employee and shareholder of Country Living Development. (Addendum 2; Record p. 108). Drew's primary responsibilities were to oversee the subdivision approvals and compliance with municipal regulatory requirements for development projects. *Id.* In 1997, in compliance with the regulatory requirements of Pleasant Grove, Country Living Development, LLC, engaged Earthtec Inc., a geotechnical and soils testing firm, to perform soils tests for the Aspen Cove development. (Addendum 1; Addendum 2; Record p. 105, 139-40). The Earthtec soils report indicated that some portions of the Aspen Cove development contained mild to moderate collapsible soils that would require compaction before building. (Record p. 110-37). Mr. Kriser does not take issue with the Andersons recital of the contents of the

construction regarding residential lots in the Aspen Cove development. *Id.* Matthew Kriser did not see the Earthtec soils report prior to the sale to the Plaintiffs. *Id.* There are no disputes of fact in regards to Mr. Kriser's knowledge at the time of the sale to the Andersons. In 2007, Mr. Kriser indicated to the Andersons that he had reviewed the contents of Earthtec report after this suit had been filed. (Record p. 193).

After purchasing the property in question, the Andersons employed David's father, Norman Anderson as the general contractor and builder of their home located on the property in question. (Record p. 96). Prior to building the Andersons home, Norman Anderson had built only five other homes. (Record p. 99). Norman Anderson failed to check with Pleasant Grove City concerning any soils testing that had been done for the Aspen Cove development, and therefore failed to discover the Earthtec soils test report. (Record p. 96). Norman Anderson failed to compact the soils underlying the footings for the Andersons home. (Record p. 99, 103). Norman Anderson failed to compact the soils that were used to fill around the basement walls, after the footings, foundation, and basement walls were formed. *Id.* Some years later the Anderson's experienced settling in the soil underlying and surrounding their home and cracks in the foundation and basement walls developed. Thereafter the Andersons brought suit against Matthew Kriser personally, alleging he had fraudulently failed to disclose that the lot had collapsible soils.

undisputed facts refute this assertion. Mr. Kriser never built anything on the Andersons property, never contracted with anyone else to perform work on the property, and never developed the property. Country Living Development did develop the property, but this has nothing to do with Mr. Kriser in his personal capacity. Moreover, the Andersons father, Norman Anderson, was the one who actually built the home and it is his negligence that has caused the damages which the Andersons complain of. In his personal capacity Mr. Kriser owed no duty of disclosure to the Andersons. Consequently, the district court's grant of summary judgment was correct, and should be affirmed.

ARGUMENT

The Andersons brought a single cause of action for fraudulent concealment against Matthew Kriser. "The three elements of fraudulent concealment are best described in this order: (1) there is a legal duty to communicate information, (2) the nondisclosed information is known to the party failing to disclose, and (3) the nondisclosed information is material." *Yazd v. Woodside Homes Corp.*, 2006 UT 47, ¶ 35, 143 P.3d 283. Because of convenience in analyzing the evidence in the record, and in order to address the issues in the same order as they have been raised by the Andersons, Appellee Matthew Kriser will first address the knowledge prong of the fraudulent concealment analysis, and will then address the duty prong of the analysis. Because the district court granted summary judgment based on the knowledge and duty prongs of fraudulent concealment, it did not reach materiality, and consequently materiality will not be addressed here.

Kriser testified that he had never seen the Aspen Cove soils test prior to the sale to the Andersons. *Id.* Finally, Mr. Kriser has testified that, although it was the practice of Country Living Development, LLC, to conduct soils tests in compliance with municipal regulations, that his understanding was that these tests were for road development, and that tests were not conducted on individual lots within a subdivision development. *Id.*

In arguing that Mr. Kriser should be held personally liable for failure to disclose the presence of soils problems, the Andersons make several leaps of logic. The Andersons argue that Mr. Kriser's general understanding that a soils study would likely have been conducted imputes on Mr. Kriser a knowledge of the actual report, and its contents. The evidence shows that because Mr. Kriser's brother, Drew Kriser, was in charge of the administrative end of the business, which included subdivision approvals, and that Mr. Kriser had no specific knowledge of any soils test prior to the sale of the property in question to the Andersons. *Id.* Moreover, Mr. Kriser specifically testified that he had not seen or read the contents of the Earthtec report prior to the sale. *Id.* Finally, Mr. Kriser testified that he knew that a soils study is generally required for subdivision development, and that he could have reasonably assumed that one had been performed for Aspen Cove. *Id.* In other words, he could have assumed that a soils study had been done, but he had no specific knowledge that one had been performed, and he had absolutely no knowledge regarding the contents or recommendations of any actual report that may have existed at the time of the sale to the Andersons. There is no evidence which contradicts these statements.

The Andersons seek to translate a general understanding regarding the requirements for subdivision approval into an actual knowledge of the compaction recommendations made in a specific report concerning a specific piece of real estate. The Andersons argue that a failure to act on his general knowledge concerning subdivision approvals is so egregious so as to impose upon an agent personal liability. The principles of fraudulent concealment are not nearly so broad.

To succeed on appeal and have this case remanded for trial, the Andersons are required to show that there is a genuine factual dispute concerning the knowledge that Matthew Kriser had of the contents of the soils report at the time of the sale to the Andersons in 1998. The Andersons have failed to demonstrate any factual dispute on this issue, and the trial court's grant of summary judgment should be affirmed.

II. IN HIS PERSONAL CAPACITY, MATTHEW KRISER HAD NO DUTY TO DISCLOSE THE SOILS REPORT.

The Andersons argue that builder-developers have an automatic duty of disclosure to subsequent purchasers and that Matthew Kriser, in his personal capacity, was the builder-developer for the Andersons particular property. This argument fails for the following reasons.

A. Matthew Kriser does not qualify as a builder-developer because Utah courts do not recognize any such designation.

Although the Andersons make free use of the term "builder-developer" to assert that Matthew Kriser owed the Andersons a duty of disclosure, the case law cited by the Andersons does not use this term. Rather, the cases use the term "builder-contractor". *Yazd*, 2006 UT 47, ¶¶ 18, 21, 22, 25; *Moore v. Smith*, 2007 UT App 101, ¶ 35, 158 P.3d

property, he never built anything on the property, and he never contracted with anyone to perform any work on the property. Country Living Development subdivided the property in question, and sold a vacant lot to the Andersons. Mr. Kriser was the agent of Country Living Development in that transaction.

The Andersons argue that because Mr. Kriser, in deposition, identified his current occupation as “builder/developer” that he has qualified as a builder-contractor in the context of this particular fraudulent concealment case. This argument is illogical. A mundane statement about one’s present occupation says nothing about whether one’s actions nine years earlier qualify under a legally defined term of art. Moreover, just because Mr. Kriser works in the building and development industry for a living does not mean that he was a “builder-contractor” for this particular transaction with the Andersons. Rather, to determine if Mr. Kriser is a builder-contractor for the transaction with the Andersons, a court is required to analyze the evidence and apply the facts to the law. In the present case, the facts and the law clearly establish that Mr. Kriser was not the builder-contractor and that he was simply acting as the agent for Country Living Development, LLC.

As to the agency status of Mr. Kriser, the undisputed facts are as follows: that at the time of sale to the Andersons, Mr. Kriser was an employee and shareholder of Country Living Development, LLC; that Country Living Development, LLC, was

argument is that Mr. Kriser was not the seller. He never owned the subject property, and could not have sold it. Country Living Development was the owner of the property and the warranty deed clearly designates Country Living Development as the seller. (Record p. 259).

obligations arising out of the offer to purchase. Taking all of the undisputed facts together, it is clear that Mr. Kiser was the agent for Country Living Development, LLC. The Andersons should not be permitted to make an innocent agent liable for the alleged acts of his principal simply because the Andersons chose not to proceed against Country Living Development, LLC, as a party to this action. Thus, Mr. Kiser, in his personal capacity, was not a builder-contractor and owed no duty to disclose to the Andersons.² The district court's grant of summary judgment should be affirmed.

C. As the builder-contractor, Norman Anderson's failure to follow the recommendations of the soils report severs any duty or liability on the part of Matthew Kiser.

A final and decisive reason why Mr. Kiser does not qualify as the builder-contractor of the Andersons home is because the Andersons actually had a separate person act as general contractor and build their home—Norman Anderson. In a fraudulent concealment action regarding allegations of a failure to disclose soils tests, Utah courts have regularly imposed on the builder-contractor significant duties and responsibilities. The Utah Supreme Court has held that, “as a matter of law,” a reasonably prudent builder-contractor should have the expertise to investigate and discover insufficient compaction on the lot on which he is building, regardless of any lack of experience. *Smith v. Frandsen*, 2004 UT 55, ¶ 20, 94 P.3d 919. Thus, the duty of

² Even if the district court had concluded that Matthew Kiser qualified as a builder contractor, which it did not, the Andersons still had the burden of showing that Mr. Kiser possessed knowledge of the report—knowledge which he did not have. Demonstration of a duty to disclose is insufficient. The doctrine of fraudulent non-disclosure does not impose strict liability on those with a duty to disclose. Knowledge of the relevant information is also required.

this case differ somewhat from the facts of *Smith v. Frandsen*, since the lot was conveyed by the developer to the homeowner, who contracted with a builder for the construction of the home, that difference is not significant to the principle espoused. That is, the independent duties of a residential contractor interrupt certain obligations running from the initial developer.

Furthermore, Utah law indicates that filing the soils report with the city and making it available for public inspection is a factor that a court can consider when determining whether the seller filled his duty to the buyer to disclose material defects. *Fennell*, 2003 UT App 291, ¶ 2. Country Living Development, LLC, satisfied its disclosure duties, the builder-contractor failed in his duties to ensure adequate compaction. That failure severs liability.

Finally, the only two entities who might qualify as builder-contractors are Norman Anderson and Country Living Development. In this analysis, Matthew Kriser's involvement or potential liability does not enter the conversation at all. He is not liable and the district court's grant of summary judgment was correct and should be affirmed.

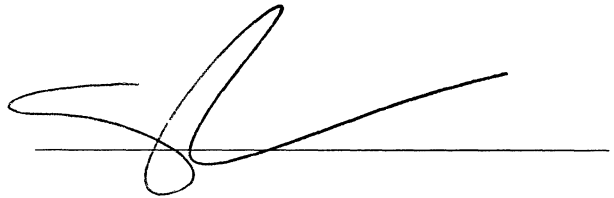
CONCLUSION

The undisputed facts show that Mr. Kriser had no knowledge of the existence of or contents of the soils report. Mr. Kriser can have no duty to disclose information which he did not have. Therefore, the knowledge element of fraudulent concealment is not satisfied, and the district court was correct in granting summary judgment in favor of Mr. Kriser. Moreover, the undisputed facts show that Mr. Kriser does not owe any duty of disclosure to the Andersons. He does not qualify as a builder-contractor, and he was not

CERTIFICATE OF SERVICE

I hereby certify that the original Brief of Defendant and Appellee Matthew Kriser, together with required copies, was hand delivered to the Clerk of the Court, in the Utah Court of Appeals and two copies mailed to the below named parties by placing the same in the United States mail, postage prepaid, this 4 day of June, 2009, addressed as follows:

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A handwritten signature in black ink, consisting of a large, stylized 'C' or 'S' shape, followed by a horizontal line extending to the right.

APPENDIX